Defendant's action has not given effect to this intention and the condition is still subsisting as part of the contract.

As regards the other submission, to establish the defence of frustration the defendant must show that the alteration of the law has affected the basis of the contract in some way.

The contract here was for the scale of the premises in question free from encumbrances for the consideration of $30,000/- in occupation currency. There is nothing to show that the plaintiffs were interested in any way in the manner in which defendant freed the premises from encumbrances. They may have been aware that defendant intended to pay off the charge in occupation currency but it was no part of the contract that this should be done or that the plaintiffs should suffer any losses or benefit from any profits arising from the form in which the charge was paid off. The manner in which the defendant freed the land from encumbrances was entirely a matter within his discretion and outside the scope of the contract.

The law has now cast an additional burden on the defendant but his claim that this is a burden on the land is mistaken. The claim allowed by the Debtor and Creditor (Occupation Period) Ordinance is for revaluation of a pre-occupation debt which has been paid without demand in occupation currency. It is a debt due by the defendant personally and the provision for reinstatement of the charge in certain circumstances is only to ensure the defendant discharges his liability.

The law has not made the performance of this contract impossible and an order for specific performance must be made.

Mr. Ong Huck Lim has asked for an order for payment of damages in the event of defendant transferring the property subject to the charge. The position is that the chargee has not yet applied to the Court for revaluation of the payment made to him in discharge of his charge and until he makes such an application and proves to the satisfaction of the Court that he comes within one of the prescribed exceptions the payment made by defendant is a valid discharge of his liability. There can therefore be no order respecting damages at present.

The order will be for the specific performance of the contract as prayed with liberty to apply for the assessment of damages in the event of the charge on the land being reinstated.

Defendant to pay the costs of the action.

Specific performance ordered.

KHOO SOO JIN & ANOR. v. LYE YEW SONG.

[Orig. Civ. Juris. (Jobling, J.) April 12, 1951]

[Penang — Originating Summons No. 338 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 4(2)(b)(ii) —Mortgage — Principal and Interest — Mortgagees taking possession to collect Interest.

In this case the respondent mortgaged his property to the applicants before the Japanese occupation of Malaya to secure a loan and repaid the loan in February, 1945 in occupation currency.

Applicants entered into possession of the property as mortgagees in March, 1944 to obtain payment of interest under the mortgage.

A demand for repayment of the debt was alleged by respondent and denied by applicants.

Held, that no verbal or written demand for repayment was made. The interest and principal could not be separated and together they constituted the debt under the mortgage. Applicants by entering into possession had taken steps to enforce payment of the whole debt. This was notice to the respondent that repayment of the whole debt was required and was a demand within the meaning of section 4(2)(b)(ii) of the Ordinance.

Cases referred to :—

(1) *Bovill v. Endle* (1896) 1 Ch. Div. 648.

(2) *Ex Parte Wickens* (1898) 1 Q.B. 543.

ORIGINATING SUMMONS.

C. O. Lim for the applicants.

T. E. Conaghan for the respondent.

The facts sufficiently appear from the judgment.

Cur. Adv. Vult.

Jobling, J. : — The applicants' claim is for revaluation under the Debtor and Creditor (Occupation Period) Ordinance, 1948 of a preoccupation debt which was repaid in occupation currency, and reinstatement of the security formerly held by them in respect thereof.

The applicants allege that the debt was repaid without demand by them and the respondent gave evidence that he only repaid under pressure from the applicants.

On the point of whether there was an actual demand made by the applicants Mr. Lim Gim Hoe gave evidence, supported by letters written by him at the time, that the initiative in paying the debt was taken by the respondent. Mr. Lim Gim Hoe is an advocate and solicitor of this Court and I accept his evidence unreservedly and find that no verbal or written demand was made by applicants.

It is, however, admitted by the applicants that in March, 1944 in exercise of their rights as mortgagees they entered into possession of the mortgaged property, collected the rents therefrom and credited the amount

received against interest due to them on the mortgage. The balance of their collections, some $963/-, they held without accounting for it to the respondent.

The applicants state that they went into possession because a receiver had been appointed of respondent's lands and they wished to protect their interests; they only wished to secure payment of the interest on their mortgage and had no intention of repaying themselves the principal. There is ample evidence to support this and I accept it.

Mr. Conaghan for the respondent has contended that the entry by the applicants constituted a legal demand for repayment of the mortgage debt and has cited *Bovill v. Endle*[1] in support. The point decided in that case was that where a mortgagee has entered into possession of the mortgaged property he cannot refuse tender of his principal, interest and costs on the ground that he is entitled to six months' notice or six months' interest in lieu of notice. Kekewich, J. in giving judgment said :—

"It appears to me that, although the case is not actually covered by authority, yet it is by principle; and that a mortgagee cannot enter into possession for his own benefit and then say he is entitled to remain in the position of a mortgagee out of possession, and to ask for six months' notice or interest. The two positions are inconsistent. In my opinion by entering into possession the mortgagee says he requires payment, and payment in the way in which the law gives it to him."

The Court of Appeal impliedly approved of this view in *Ex Parte Wickens*[2].

The decision answered the question whether entry into possession was a taking of proceedings with a view to compelling payment of the debt and I think this is essentially the question which arises in these proceedings and it must be answered in the same way.

The property was mortgaged to secure repayment of principal and interest and these two items cannot be separated. Together they form the debt due under the mortgage and on entering into possession applicants took steps by which they could obtain payment of the whole amount due and in my view this constituted a notice to the respondent that applicants required payment of the whole debt and not merely of that part of it which represented interest.

The action of the applicants was in effect a demand for payment and as long as they continued in possession it was a continuing demand.

In my opinion the debt was not paid without demand and the applicants have not brought themselves within the exception to section 4(2)(b)(ii) of the Debtor and Creditor (Occupation Period) Ordinance. The claim is, therefore, dismissed with costs.

Claim dismissed.

MEYAPPA CHETTIAR v. TAN UN TING AND THREE ORS.

[Orig. Civ. Juris. (Jobling, J.) April 12, 1951]

[Penang — Originating Summons No. 274 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 11(1) and (5) — Repayment of Mortgage Money — No demand made — Revaluation of repayment money.

1st and 4th defendants mortgaged property to the plaintiff prior to the Japanese occupation of Malaya to secure two loans and the 2nd defendant joined in as surety. In January, 1945 the 3rd defendant repaid the loans and the plaintiff by direction of the 1st defendant transferred the mortgage to the 3rd defendant. Plaintiff claimed revaluation of the repayment and reinstatement or replacement of the security. A demand for repayment was alleged by defendants and denied by Plaintiff.

Held, that no demand for repayment was made and repayment must be revalued. Transfer of a mortgage is not a discharge within section 11(1) of the Debtor and Creditor (Occupation Period) Ordinance, 1948 and reinstatement of the security cannot be ordered. The only appropriate order is an order for replacement of the security under section 11(5).

ORIGINATING SUMMONS.

R. D. Hume for the plaintiff.

Chew Choon Poon for the first defendant.

Ong Huck Lim for the third defendant.

Lim Cheng Ean for the fourth defendant.

Second defendant did not appear.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Jobling, J. : — The plaintiff in this matter claims under the Debtor and Creditor (Occupation Period) Ordinance, 1948 for revaluation of the payment of a debt made during the Japanese occupation and reinstatement or replacement of the security formerly held by him in respect thereof.

It appears that the plaintiff lent the Estate and persons now represented by 1st and 4th defendants $30,000/- and $5,000/- on two mortgages of certain property and the 2nd defendant joined in and guaranteed repayment of the loans.

The loans were repaid by the 3rd defendant on 30th January, 1945 at the instance of the 1st defendant and on 5th February, 1945 the plaintiff transferred the mortgages to the 3rd defendant.

On 30th January, 1945 1st defendant entered into an agreement with 3rd defendant to sell to him his one-third interest in the mortgaged property for the sum of $50,000/-.

The plaintiff claims revaluation of the repayment of the loans on the ground that it was made without